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No. 07-651

IN THE

Supreme Court of the United States

ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER, INC., ENTERGY POWER MARKETING CORPORATION, ENTERGY ARKANSAS, INC., AND ENTERGY GULF STATES, INC.,

Petitioners,

v.

DAVID JENKINS AND CINDY JENKINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

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MOTION OF EDISON ELECTRIC INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Amicus curiae Edison Electric Institute ("EEI") respectfully requests leave of this Court to file the following Brief in the above-captioned matter. In support of its motion, EEI states:

1. EEI requested the consent of both the Petitioner and Respondent to file its amicus brief. The Petitioner granted its consent in writing. Petitioner's written consent has been filed with the Court. Respondent stated in writing that it would

have consented to the filing of the amicus brief if the brief was filed timely, and the Respondent takes no position on whether the Court should grant EEI's motion for leave to file the brief. Respondent's letter has been filed with the Court.

2. Counsel for EEI just learned of the recently revised amicus curiae brief filing deadlines and notice requirement in Rule 37.2. In this case, by order dated November 28, 2007, the Court extended the time to file a response to the petition to January 16, 2008. EEI counsel wrongly assumed amicus curiae briefs also were due on January 16, 2008, as under the previously effective Court rules. However, under the text of revised Rule 37.2, it appears that the amicus brief was due December 28, 2007, or 30 days after a response is called for by the Court. Rule 37.2 also requires an amicus curiae to notify all parties of its intention to file an amicus curiae brief at least 10 days prior to the due date for such brief.

3. The Clerk's comment on Rule 37.2 states that the purpose of the earlier filing deadline revision is to allow the respondent time to respond to an amicus curiae brief in the same document and at the same time as it responds to the petition for writ of certiorari. EEI respectfully submits that this purpose is met in this case, as Respondent will have 12 days to consider and respond to EEI's amicus curiae brief.

4. EEI is the national association of U.S. shareholder-owned electric utilities, their affiliates and industry associates worldwide. Its U.S. members serve 95% of the ultimate customers in the shareholder owned segment of the industry and represent approximately 70% of the U.S. electric power industry. They own about sixty percent of transmission system facilities in the country. EEI

members are extensively regulated at both the federal and state levels. EEI's members have a strong interest in assuring the exclusive authority of the Federal Energy Regulatory Commission ("FERC") in regulating rates, terms and conditions affecting wholesale sales and transmission of electricity in interstate commerce, and for this reason EEI has participated before this Court in a long line of cases that have consistently sustained FERC authority against collateral challenges in state forums. *Entergy Louisiana, Inc.* v. *La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003) ("*ELI*"), *New York v. FERC*, 535 U.S. 1 (2002) ("*New York*"), *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*MP&L*"), *Nantahala Power & Light* v. *Thornburg*, 476 U.S. 953 (1986) ("*Nantahala*").

5. EEI submits that the potential implications of the Texas court decision are of immense national importance. EEI believes that its familiarity with the national electric industry and FERC's regulation thereof will aid this Court's understanding of the issues presented in this case. EEI's brief focuses on the extent to which the Nation's interstate electric grid is operated by regional system operators under FERC-approved tariffs analogous to that at issue in this case and how the likely attempted application of the Texas court ruling by juries applying the common law of torts has the potential to disrupt FERC's exclusive authority to manage this nation's wholesale electric markets if the Texas decision is allowed to stand. *See infra*, Brief of Amicus Curiae Edison Electric Institute, at 6-13.

Respectfully submitted,

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QUESTION PRESENTED

The question stated in the petition for a writ of certiorari is: "Whether, under *Entergy Louisiana, Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003), *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), a state court may determine that the bulk power supply arrangements of an interstate power pool governed by a FERC tariff violate state tort law and may award retail customers damages based on what their electricity rates would have been if the interstate power pool operated in the manner that the state court jury finds prudent?"

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INTEREST OF AMICUS CURIAE[1]

The interest of amicus curiae is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Texas court decision intrudes on the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC") in violation of the Federal Power Act and the Supremacy Clause. The concern of the Edison Electric Institute ("EEI") is that the Texas court decision raises serious implications for uniform regulation of the national electric markets and the continued effective functioning of regional organized markets. *See infra* at 6-13. Under the rationale of the Texas court, retail ratepayers may bring class actions challenging "discretionary" aspects of decisions affecting wholesale rates that result from an array of arrangements common in the industry, including regional transmission organizations and market-based rate auctions. Under sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d & 824e, any

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. As discussed in the motion accompanying this brief, EEI counsel has notified all counsel of record of its intention to file this brief, but was not aware of the revised Rule 37.2 notice requirement until the time for complying with such requirement had passed. The Petitioner has consented to the filing of this brief. Respondent stated in writing that it would have consented to the filing of the amicus brief if the brief was filed timely, and the Respondent takes no position on whether the Court should grant EEI's motion for leave to file the brief.

complaints about wholesale power rates must be resolved by FERC—the neutral body established by Congress—under the Federal Power Act, not by juries prone to exercising parochial interests under common law. If allowed to stand, the Texas court decision will impair FERC's ability to regulate multistate holding company systems, organizations operating regional markets, and wholesale power auctions.

EEI believes that the Texas decision so clearly runs afoul of the prior decisions of this Court that a grant of certiorari is warranted.

STATEMENT OF THE CASE

EEI adopts the Statement of the Case in Entergy's petition for a writ of certiorari ("Petition").

REASONS FOR GRANTING THE PETITION

EEI supports fully the in-depth legal analysis in the Petition. In EEI's judgment, the Petition accurately and persuasively states controlling law which warrants a grant of certiorari. In addition, EEI submits that the potential implications of the Texas court decision are of immense national importance. Granting the Petition for a Writ of Certiorari is required in order to avoid potential disruptions to this nation's organized electric markets, and FERC's exclusive regulation of activities affecting such organized markets, resulting from independent state common law court decisions that may result if the Texas court decision is allowed to stand.

1. Supreme Court Precedent Bars the Texas Court Decision. The Court's decisions in *Entergy Louisiana, Inc.* v. *Louisiana Public Service Commission*, 539 U.S. 39 (2003) ("*ELI*") and

Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*MP&L*") both addressed the very System Agreement at issue here. Those decisions squarely apply to the issues presented in this case and foreclose the Texas state court ruling. The Texas state court decision presents a compelling case for this Court to grant the petition to protect the integrity of FERC's exclusive jurisdiction over wholesale markets, rates and cost allocations and to ensure the proper functioning of national electric markets.

The case for granting the petition perhaps is even stronger here than in those prior cases, because the prior cases involved state public utility review of matters committed exclusively to FERC while the Texas decision would allow lay juries to review those matters. The prospect of substantially varying state-by-state jury evaluations of the "prudence" of wholesale energy cost allocation and purchasing decisions by a multistate system operator strikes at the core of FERC's exclusive jurisdiction and the Federal Power Act. The Act gives FERC alone "plenary" jurisdiction to regulate all aspects of wholesale transactions, regardless of their "impact" on state regulation, and thus draws a "bright line easily ascertained" that divides federal and state authority. *FPC* v. *S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). As this Court has repeatedly held, FERC's jurisdiction is "exclusive" and "applies not only to rates but also to power allocations that affect wholesale rates." *MP&L*, 487 U.S. at 371. The "filed rate doctrine" requires states to give effect to wholesale rates and power allocations contained in FERC tariffs unless and until they are disapproved by FERC and was developed to "enforce the exclusive jurisdiction vested by Congress in FERC." *Nantahala*

Power & Light Co. v. *Thornburg*, 476 U.S. 953, 966 (1986) ("*Nantahala*").

Contrary to this consistent precedent, the Texas court held that juries may nullify FERC-jurisdictional cost allocations and purchasing decisions in tort actions when it is alleged that the allocations and decisions are the product of discretionary decisions of the operators of interstate power pools. Petition, App. 30a-32a. If allowed to stand, this holding would permit lay juries to review practices contemplated in FERC-approved tariffs affecting FERC-approved rates and cost allocations and to prevent the recovery of wholesale costs that FERC tariffs mandate be allocated to retail ratepayers in particular states. There is no question that this holding is barred by *ELI* and *MP&L*. The primary basis upon which the Texas court rests its decision—that a state court may review *discretionary* FERC-jurisdictional procurement decisions—was addressed head on in *ELI*. The Court found that it made no difference to its preemption analysis that the FERC tariff in question (the same System Agreement at issue here) delegated discretion to make such decisions to a particular group rather than prescribing the precise rate. *ELI*, 539 U.S. at 49-50. As the Court clearly found in *ELI*:

> It matters not whether FERC has spoken to the precise classification of ERS units, but only whether the FERC tariff dictates how and by whom the classification should be made. The amended system agreement clearly does so, and therefore the LPSC's second-guessing of the classification . . . is pre-empted.

ELI, 539 U.S. at 50. That precise analysis applies when such decisions are subjected to review by lay juries as opposed to state utility commissions as

Entergy explains compellingly in its Petition. Petition at 17-18.

Beyond its general reliance on the decisions being discretionary, the Texas court attempts to carve exceptions to FERC jurisdiction that do not exist under controlling law. First, the Texas court offers that a state court may consider, on a case-by-case basis, whether state review of the discretionary decisions would "impact or impair FERC's flexibility." Petition, App. 30a. This Court has "long rejected this sort of 'case-by-case analysis of the impact of state regulation upon the national interest.'" *MP&L*, 487 U.S. at 374 (quoting *Nantahala*, 476 U.S. at 966 (quoting *S. Cal. Edison*, 376 U.S. at 215-16)). *ELI* held that *all* charges imposed pursuant to FERC-approved tariffs, whether fixed or not, should be treated the same, for a different rule "would substantially limit FERC's flexibility in approving cost allocation arrangements." *ELI*, 539 U.S. at 50.

Second, the Texas court justifies the intrusion on FERC's exclusive jurisdiction because the operating company purportedly has "broad" discretion over bulk power supply arrangements under the System Agreement and there is no "mandate that FERC oversee" these discretionary bulk power supply decisions. Petition, App. 34a. However, this Court has created no gradation of discretion for purposes of determining whether a matter is within FERC's exclusive jurisdiction. Under the prior decisions of this Court, FERC is the sole forum for resolving challenges to discretionary power supply and procurement decisions under the System Agreement. *ELI*, 539 U.S. at 49-50; *MP&L*, 487 U.S. at 371; *Nantahala*, 476 U.S. at 966. Thus, the analysis starts and stops at the determination of whether the issues affect the reasonableness of wholesale rates.

Here, without question, the FERC tariff at issue—the System Agreement—prescribes standards that govern the power supply and procurement decisions challenged by Respondents.

The Texas court also erroneously relied on the ground that FERC has elsewhere stated that "wholesale ratemaking does not, as a general matter, determine whether a purchaser has prudently chosen from among available supply options." Petition, App. 31a (quoting *Cent. Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194 at 61,975 (1998)). FERC and the courts have repeatedly held that FERC's reasoning in *Central Vermont* has no application where, as here, the purchaser is a member of an interstate power pool and the FERC rate schedule mandated that it incur the wholesale power costs at issue. *MP&L*, 487 U.S. at 373-74; *ELI*, 539 U.S. at 49-50; *Nantahala*, 476 U.S. at 972; *MP&L*, 487 U.S. at 378 (Scalia, J., concurring); *AEP Generating Co.*, 36 FERC ¶ 61,226 at 61,550-51 (1986). Even if a state can review the prudence of a buyer's power purchases when the buyer could legally have chosen to obtain power from other sources at other rates, Entergy Gulf States Inc. and the other System Operating Companies have no such choice here. *See MP&L*, 487 U.S. at 373-74.

2. The Texas Court Decision Has Broad Implications Potentially Affecting Regional Electricity Markets Throughout the Nation. The implications of the Texas court decision to undermine FERC jurisdiction potentially extend far beyond the System Agreement involving the Entergy system. The Texas court's holding potentially creates broad new exceptions to FERC's exclusive jurisdiction that litigants may seek to apply to any regional system operator. In recent years, FERC has approved a variety of regional wholesale electric power sales

and marketing arrangements where system operators are vested with decision-making authority that affects wholesale rates and cost allocations. Multistate power pooling arrangements are commonplace in the electric industry.

In response to FERC initiatives, the industry has moved to regional management of interstate transmission grid and wholesale power markets through Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs"). *See, e.g., Reg'l Transmission Orgs.*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001). These are groups of non-affiliated utilities whose transmission facilities, and often generation facilities, are under the common control of a system operator. *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001), *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,061 (2001).

Currently, regional system operators manage the operation of the wholesale electric network affecting a majority of states in the Nation.[2] The New England RTO serves the 6 New England states. The New York ISO serves New York. The PJM RTO serves not only Pennsylvania, New Jersey, Delaware, Maryland and the District of Columbia, but in recent years has been extended to serve all or parts of nine additional states (Virginia, West Virginia, North Carolina, Ohio,

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[2] A recently-updated map available on FERC's website shows the Nation's RTOs. FERC: RTO/ISO, http://www.ferc.gov/industries/electric/indus-act/rto.asp (last updated Dec. 17, 2007).

Illinois, Indiana, Kentucky, Tennessee, Michigan). The Midwest, or MISO, RTO serves all or portions of 13 states (Pennsylvania, Ohio, Michigan, Indiana, Illinois, Missouri, Kentucky, Wisconsin, Iowa, Minnesota, North Dakota, South Dakota and Montana). The Southwest Power Pool, or SPP, RTO serves all or portions of seven states (Kansas, Oklahoma, Missouri, Arkansas, Louisiana, Texas and New Mexico). And the California ISO serves utilities in California, but has the potential to affect wholesale electric rates and practices for all states West of the Rocky Mountains (*i.e.*, Washington, Oregon, Idaho, Montana, Wyoming, Nevada, Colorado, Utah, New Mexico and Arizona).

For each of these regional organizations, FERC has approved complex tariffs that set forth rules, processes and procedures that must be followed in order to establish regional markets for wholesale electric transactions and to control multistate transmission operations. *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001), *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,061 (2001). The agreements to form and operate these regional system organizations require EEI members in different States to bear significant costs. If individual states could prevent individual utilities from recovering some or all of the costs assigned to or incurred by them under these FERC jurisdictional agreements, EEI members could face significant financial hardship and FERC's efforts to promote regional electricity markets could be thwarted.

In numerous instances, the FERC-approved tariffs give broad decision-making authority to a system or regional operator without spelling out every detail in the tariff how such decisions should be made. This is essential given the complexity of the interstate

electric network and the need to ensure that generation can reliably serve customer needs on a minute-to-minute basis. *New York v. FERC*, 535 U.S. 1, 15-17 (2002) (upholding FERC's jurisdiction and noting the technological complexities of the national grids).

Despite the complexity of regional system operations and the detailed FERC tariffs and rules, terms and conditions affecting their operation, under the Texas court holding, retail customers or their representatives could seek to nullify these FERC-approved arrangements and decisions to recover alleged overcharges as tort damages by bringing state-law actions claiming that the resulting wholesale rates or cost allocations are excessive due to arrangements and decisions FERC has chosen to leave under the FERC-approved tariff to the system operator or other wholesale utilities.

If allowed to stand, litigants could rely on the Texas state court holding to support a class action suit and/or jury trial in state court against any regional system operator or system member that makes decisions pursuant to FERC-approved tariffs and/or agreements. Regional system enabling agreements and tariffs, like the Entergy System Agreement, often do not mandate every detail of specific decisions, but rather vest system operators with authority to make such decisions.

Many regional system operators control both the dispatch and transmission of electric energy. A plaintiff representing a group of customers in a transmission-constrained area in such a region could point to a number of decisions made by the regional system operator pursuant to FERC-delegated authority that have the effect of increasing the delivered price of power to the customers. However,

any decision that had the effect of raising the price of power in one portion of a region may well keep the price of power lower in another portion of the region. Thus, if the decision were made in a different manner that had the effect of lowering prices in one region and raising them in another region, other customers might find the alternative decision was "imprudent" under the rationale of the Texas court and ask a lay jury to review such decision.

In virtually any regional system, the energy pricing formula is FERC-approved, and the operation of the system must comply with numerous and complex operational and reliability requirements. While FERC approves the relevant electric system rules, at some point implementation of the energy pricing formula and rules rests on an underlying representation of the transmission capability of the system that is developed using a number of engineering and operational decisions not explicitly set forth in a FERC approved tariff or reliability rule. This would include key inputs such as transmission line transfer capabilities (*i.e.*, how much power a line can transmit at a given time), a technical concept that varies with use of the networked transmission grid, temperature and other factors. A conservative set of decisions affecting transfer capability to assure reliability could result in higher energy prices in transmission-constrained areas. There are dozens of similar types of decisions that a regional system operator makes on a regular basis that are not mandated explicitly by the tariff but delegated to the system operator by FERC.

Decisions about the transfer capability of the transmission system are involved when a regional system operator determines how many Financial Transmission Rights ("FTRs") can be made available

to the market. Under FERC-approved tariff rules, FTRs are financial instruments that entitle the holder to a stream of revenues (or charges) based on the hourly energy-price differences across the transmission path. The availability of FTRs for hedging will directly affect the delivered price of power to a transmission-constrained region. A plaintiff could allege that the regional operator was unreasonably restricting the availability of FTRs through its decisions in developing the model that determines the quantity of FTRs that can be issued.[3]

Yet another area in which a regional system operator has decisional judgment under a FERC-approved tariff (in its role as a transmission system operator) is in scheduling of transmission outages. If a regional system operator were to approve a line outage and then some event occurred during the outage and the combined effect was to make locational energy prices rise, under the Texas court's rationale, a plaintiff could bring a suit in state court alleging negligence in state court and claim that the regional system operator could have reasonably foreseen the problem and should have scheduled the outage at a different time.

In short, under the Texas court holding, a plaintiff could challenge any of a large number of a regional system's complex underlying operational decisions and the energy prices that result from them, so that a state court jury would, in effect, second guess the regional system operator's decisions and the resulting

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[3] Resources discussing FTRs are available on PJM's website, www.pjm.com, including a document containing frequently-asked questions regarding FTRs. *See* FTR Market, Frequently Asked Questions, http://www.pjm.com/markets/ftr/downloads/ftr-faqs.pdf (last updated Feb. 1, 2005).

energy prices. In each of the above examples, the Texas court holding, if allowed to stand, could be relied on to support the legal theory that a state jury may determine whether retail customers paid excessive electricity prices as a result of such decisions of the regional system operator, because the operational decision, while committed to the regional system operator under a FERC approved tariff, was not explicitly mandated. This is precisely the second guessing the Court held was preempted in *ELI*.[4] Whether it is a multistate holding company acting as a system operator under a FERC-jurisdictional system agreement, or an organization acting as a system operator under a FERC-jurisdictional tariff and Operating Agreement, the Texas Court of Appeals decision, if not overturned, would open the door to countless state court juries reviewing critical decisions made pursuant to FERC-jurisdictional tariffs.[5] The Federal Power Act, as found by this

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[4] As explained in the Petition, FERC has also established alternative "market-based" mechanisms for providing electricity at wholesale, including the use of formal auctions to procure power. Because the FERC-approved market-based tariffs and regulations do not prescribe the price of energy or every detail of an auction, litigants may attempt to rely on the Texas decision to challenge auction results in state court. An Illinois federal district court recently denied such a state law class action in which retail ratepayers claimed that rates resulting from an auction under authorization set forth in FERC market-based tariffs were excessive and sought to collect the amount of the alleged overcharges as tort damages. *Schafer ex rel. Wexler* v. *Exelon Corp.*, Nos. 1:07-CV02316 & 1:07-CV-2318, 2007 WL 4557815, (N.D. Ill. Dec. 21, 2007).

[5] The exclusivity of FERC's jurisdiction and FERC's plenary authority is the same regardless of whether the decision involves wholesale energy transactions, rates, cost allocations or decisions affecting transmission availability. *ELI*, 539 U.S. at 49-50, *New York*, 535 U.S. at 23-24.

Court, requires that FERC be the sole forum for determining the reasonableness of wholesale electric rates and cost allocations. Given the critical importance of the issues at hand to the functioning of the national electric industry and FERC's role as the neutral body regulating the wholesale power industry, EEI urges the Court to grant the Petition.

CONCLUSION

The petition for writ of certiorari should be granted.

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